**Al-Busaidy v Gulf African Bank Ltd & another (Civil Suit 3 of 2022) [2024] KEHC 6430 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6430 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL SUIT 3 OF 2022**

**SM GITHINJI, J**

**JUNE 3, 2024**

**BETWEEN**

**MAJID ALI TALIB AL-BUSAIDY ..... PLAINTIFF**

**AND**

**GULF AFRICAN BANK LTD ..... 1ST DEFENDANT**

**THAARA AUCTIONEERS ..... 2ND DEFENDANT**

**RULING**

1 For determination is the Plaintiff's Notice of Motion dated 29th November 2022 seeking the following orders;

1. Spent.
2. Spent.
3. That at the ex parte hearing a Temporary injunction order do issue restraining the Defendants by themselves, their servants, agents and anyone claiming interest and/or acting under them from selling and/or auctioning the Plaintiff/Applicant's property Portion No. 3488 (Orig. No. 347613) till this suit is heard and finalized.
4. That costs of this application be in the cause.

2 The application is premised on the supporting affidavit of Majid Ali Talib Al-Busaidy the Applicant herein who deponed that he has been and is still a valuable customer of the 1st defendant operating an account at its Malindi branch. That due to a good business relationship he has with the 1st defendant he applied for a loan facility in 2016 to enable him improve his real estate business and was advanced a loan of Kshs. 20,000,000 to be serviced for a period of 15 years from March 2016 to end on 24th October 2032. That at the onset, the instalments were Kshs. 387,026 per month. He stated that sometime in the year 2021 due to dwindling economy, together with the bank they restructured to Kshs. 258,000

per month which he has been paying and the last payment was in August and November 2022. It was stated that he was in six months arrears on the loan repayment but has made a total payment of Kshs. 17,242, 406.23. He additionally stated that he is willing to continue with the payments but vide the Notification of sale dated 16th September 2022, the 1st defendant instructed the 2nd defendant to sell the property by way of public auction. Mr. Majid Ali further deponed that the 1st defendant is demanding the entire balance of Kshs. 17, 832,861 with costs totaling to Kshs. 19,015,089 as at 14th September 2022 yet the period for the loan is to end in 2032.

3 It is his further statement that the property was valued at Kshs. 45,000,000 in 2015 when he applied for the loan and the same was valued at 27,000,000 in 2021 which valuations were both carried out by the 1st defendant. Further that the 2nd Defendant in its notification of sale has stated the value of Kshs. 21,400,000 yet the property has greatly appreciated since 2015 and the defendants have stated the valuation in order to sell the property at a throw away price to satisfy the 1st Defendant's needs and if it happens he shall be put to great loss and damage.

4 The application is opposed by the 1st Defendant vide the Replying affidavit sworn by Lawi Sato the 1st Defendant's Senior Legal Officer. He deponed that the plaintiff was advanced a loan facility on the security of charge dated 8th February 2016 registered over the suit property. He stated that as per clause 5.1.1 of the charge, the failure to pay any single installment when it fell due constituted an event of default and as per the clause, in event of default all sums secured by the charge would immediately fall due. Further at clause 6, if an event of default occurred, the 1st defendant was entitled to demand payment of all the monies secured by the charge. Consequently, given the admitted default, the 1st defendant was contractually entitled to immediately demand the entire amount secured by the charge despite the fact that the term of the facility was 15 years. He additionally stated that the plaintiff is admittedly in default and does not dispute that it has been served with the statutory notices and it would be inequitable to restrain the 1st Defendant from realizing its security.

**Disposition**

5 The application was disposed of by way of written submissions. I have considered the application and the grounds it is set upon and the response thereto. I have as well considered the written submissions and the attendant authorities. The issue arising for determination is whether the applicant has met the threshold for grant of an interlocutory injunction as sought.

6 The law governing the granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides that: -

Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure Cap. 21 [Subsidiary] C17 – 165;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

7 The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [Supra] where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

8 Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

9 The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

> ...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

10 The Court of Appeal in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, defined a prima facie case as follows;

> A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."

11 From the above definition, it is clear that a prima facie case means more that an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant's case at the trial. Has the Applicant therefore demonstrated this?

12 The gist of the Applicant's case is that the 1st defendant has undervalued the suit property to satisfy his needs and that if the same is sold at a throw away price he stands to suffer loss and damage. Further that the property has appreciated in value from the year 2015 when it was valued at Kshs. 45,000,000. In opposing the grant of the interlocutory injunction, the 1st defendant's case is that the Applicant defaulted in repayment of the loan and it was acting within its contractual obligation of realizing its security.

13 I have gone through the charge dated 8th February 2016; as per clauses 5 and 6 as pointed out to me by the 1st Defendant, the terms are that in the event the Applicant defaulted in any instalment, all the sums secured by the charge would immediately fall due and the 1st defendant is entitled to demand payment of all the monies secured by the charge. The Applicant admits to being in six months' arrears. He further admits that he was served with notices that the 1st defendant intended to sell the property to realize the sums owed. In my view, the 1st defendant acted within the confines of the charge which was duly executed by the parties and has not been contested. The only substantive issue raised by the Applicant is the valuation of the property which is not an issue for determination by this court as there is no competing valuation and it is not the primary issue that the Applicant seeks to have determined.

14 It is my finding thus, that the Applicant has not established a prima facie case to warrant granting of the injunctive relief sought. In any event, the Applicant does not stand to suffer any loss that may not be compensated by an award of damages.

15 Having established that the Applicant has not established a prima facie case, I need not delve into the two other pillars. This was well settled in *Nguruman Limited -v- Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

> In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. ... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration." (emphasis mine)

16 In the outrun, I make the following orders;

1. The Notice of motion dated 29th November 2022 be and is hereby dismissed for want of merit.
2. No orders as to costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 3RD DAY OF JUNE, 2024.**

**.....**

**S.M. GITHINJI**

**JUDGE**

In the absence of the parties. Parties be notified.